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No. 10-719

IN THE

Supreme Court of the United States

DAVID H. SCHEFFER, MARY C. BERGEVIN, JOSEPH L. STEPHANY, AND LAURA J. SWARTZENBERG,
Petitioners,

v.

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 828; CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000; AND AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as the Second Circuit held, the district court's refusal to appoint petitioners' attorneys as class counsel under Rule 23(g) was "well grounded in the record," and thus within the district court's discretion, where the record contained evidence from which the court could conclude that the litigation objectives of petitioners' counsel and the organization that employed them and funded the litigation were contrary to the economic interests of the public employees who made up the putative class.

CORPORATE DISCLOSURE STATEMENT

Respondent Civil Service Employees Association, AFSCME, Local 1000 ("CSEA") is organized as a nonprofit corporation. It has no parent corporation, and no publicly held corporation owns any stock in it.

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BRIEF IN OPPOSITION

Respondents Civil Service Employees Association, Local 828 ("Local 828"), Civil Service Employees Association, AFSCME, Local 1000 ("CSEA"), and American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") respectfully urge the Court to deny the petition for writ of certiorari. The Petition seeks review of a footnote in the opinion of the Court of Appeals for the Second Circuit, in which that court held that, on the factual record presented, the district court had not abused its discretion in denying the application of petitioners' counsel for appointment as class counsel pursuant to Federal Rule of Civil Procedure 23(g). That fact-bound determination presents no legal issue worthy of this Court's consideration.

STATUTORY PROVISIONS INVOLVED

In addition to the excerpts from Federal Rule of Civil Procedure 23(g)(1) that are quoted in the Petition, Pet. at 3, the following portions of Rule 23(g) are also pertinent:

> (2) ***Standard for Appointing Class Counsel.*** When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). . . .
>
> . . .
>
> (4) ***Duty of Class Counsel.*** Class counsel must fairly and adequately represent the interests of the class.

Fed. R. Civ. P. 23(g).

STATEMENT

A. Respondent Civil Service Employees Association ("CSEA") is a labor organization that is recognized, pursuant to applicable state and federal labor-relations statutes, as the collective-bargaining agent for over 200,000 employees, in a variety of occupations, in New York State. That total includes approximately 76,000 state government employees, some 112,000 employed by local governments, and 4,300 private-sector employees. Of the employees CSEA represents, 91% are members of the union, while the remaining 9% – some 18,700 persons statewide – have declined to become union members. Under applicable law and collective bargaining agreements, and as permitted by this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), those nonmembers are required to pay "agency shop" fees to help defray the cost of negotiating and enforcing collective bargaining agreements that benefit members and nonmembers alike. As required by this Court's cases, CSEA rebates a portion of the agency shop fee to those nonmembers who voice an objection to paying the por-

tion of union dues that is expended for activities not germane to collective bargaining.

The four petitioners (along with a fifth plaintiff who did not join in the appeal from the district court's judgment) were employed as probation officers by Monroe County, New York, and were part of a bargaining unit of county employees represented by CSEA through its administrative subdivision, respondent Local 828. Plaintiffs were dues-paying members of the union until June 2005, when they submitted nearly identical letters to CSEA resigning their union membership and stating their objection to paying for union activities not related to collective bargaining. Plaintiffs were, accordingly, treated thereafter as agency fee "objectors" and were sent quarterly rebate checks in advance to reimburse them for the "nonchargeable" portion of the agency shop fees that were withheld through payroll deduction pursuant to New York statute.

B. Notwithstanding that their requests for nonmember "objector" status had been fully respected, plaintiffs – represented by attorneys employed by the National Right to Work Legal Defense Foundation ("Foundation") – filed this class action lawsuit some six months after resigning their union memberships, alleging in general terms that the union had violated their rights under the First Amendment in connection with its collection of agency fees. As subsequently clarified through interrogatory answers, their complaint advanced two claims on behalf of the putative class: (1) that CSEA's expenditures for "organizing" should not have been classified as chargeable to objecting agency fee payers; and (2) that CSEA's explanation of the basis for its agency fee – provided annually to all nonmembers as required under *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986) – was insufficient because of its reliance on a presumption in calculating the chargeable percentage of the funds CSEA disbursed to its 1,300 local administrative subdivisions.

Despite the fact that these claims implicated only a portion of the fees charged to objectors, the complaint filed by the Foundation attorneys demanded the return of *all* agency shop fees (even the portion that was indisputably chargeable to objectors) paid by *all* nonunion employees (even those who had not elected objector status).[1] In addition, the complaint demanded punitive damages.

Following discovery, plaintiffs moved under Rule 23 for certification of a statewide class of all nonunion employees in CSEA-represented bargaining units who since November 2002 had been required to pay agency shop fees to the union. Plaintiffs also asked that their Foundation-provided attorneys be appointed as class counsel pursuant to Rule 23(g).

In addressing that motion, the district court, Hon. Michael A. Telesca, declined to appoint the Foundation attorneys as class counsel, and otherwise held in abeyance the class-certification motion. In making its determination, the court relied on evidence in the record indicating that the Foundation's objective in bringing class action lawsuits on behalf of public-sector employees against their union representatives was to "defend the interests of the taxpayers who are forced to pay those public employees' salaries and benefits by weakening the ability of unions to achieve gains for public sector employees that entail costs to taxpayers ...." Pet. App. at 39a. And, based on discovery documents and counsel's conduct of the litigation, the court found that the "Foundation attorneys are not able to separate them-

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[1] All of the plaintiffs testified on deposition that the idea of demanding "restitution" of all agency shop fees collected by the union originated with their Foundation attorneys; and some of the plaintiffs said they were unaware that the complaint would include such a demand until after it had been filed. Pet. App. at 38a & n.3; CA2 App. at 87, 102, 116, 128, 139-40.

selves from the Foundation" in litigating the case. *Id.* at 41a. As a result, the court concluded that the Foundation-employed attorneys did not meet "the requirement of undivided loyalty of class counsel," *id.* at 40a, imposed by Rule 23(g).

Having held that plaintiffs' counsel could not adequately represent the putative class of public-sector employees, the court initially appointed a local labor attorney as substitute class counsel in order to determine "whether or not an attorney-client relationship can be established with the class members." *Id.* at 43a. After the plaintiffs indicated their unwillingness to accept that attorney as their counsel, the district court twice urged them to identify other substitute counsel of their choice as potential class counsel. *Id.* at 46a, 48a. Upon plaintiffs' refusal to do so, however, the court permitted the litigation to proceed with the Foundation attorneys representing plaintiffs in prosecuting their claims only in their individual capacities. *Id.* at 55a-57a.

The parties thereupon filed cross-motions for summary judgment. Granting defendants' motion, the district court upheld the procedures used by CSEA to calculate the chargeable percentage of its disbursements to its local administrative subdivisions, holding that it was reasonable and constitutionally permissible under the circumstances for CSEA to use a presumption that the chargeable percentage of those expenditures was at least as great as the chargeable percentage of its overall expenditures. *Scheffer v. CSEA*, No. 05-CV-6700, 2007 WL 2126286, at **7-10 (W.D.N.Y. July 25, 2007). Turning to the chargeability of CSEA's organizing expenditures, the court concluded "that organizing private-sector employers operating in the same competitive market as CSEA-represented [public-sector] bargaining units, is germane to protecting, through collective bargaining, the wages,

benefits and working conditions of bargaining unit members," *id.* at *13, and that CSEA's expenditures for this purpose therefore were chargeable to objecting agency fee payers. *Id.* at **10-14.[2]

C. Four of the five petitioners appealed the district court's rulings, both on the two merits issues and on the court's refusal to appoint their attorneys as class counsel, to the United States Court of Appeals for the Second Circuit. Following briefing and argument, that court issued its ruling on June 28, 2010, affirming in part and reversing in part. On the merits issues, the court affirmed the district court's holding that CSEA's method of calculating the chargeable percentage of its disbursements to its local affiliates was constitutionally permissible. Pet. App. at 17a-22a. On the chargeability of organizing expenditures, the court of appeals agreed with the district court that under the circumstances CSEA's expenditures to organize competing private-sector workplaces were germane to its collective-bargaining efforts on behalf of its existing public-sector bargaining units. The court nonetheless reversed the district court's grant of summary judgment to defendants on this point on the ground that it had not been shown that the four plaintiff-appellants, all probation officers, could themselves benefit from the union's organizing efforts that were focused on other occupations represented by CSEA. *Id.* at 8a-17a.

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[2] The court also rejected the individual claims advanced by four of the plaintiffs that their First Amendment rights had been violated because they had not received copies of CSEA's 2005-06 agency shop notice – which had been mailed out to all nonmember agency fee payers at a time when the plaintiffs were still union members. The court held that the four plaintiffs had suffered no cognizable injury, as their requests to be treated as agency fee objectors for 2005-06 had been honored. 2007 WL 2126286 at *14. Plaintiffs did not raise this issue on appeal.

As to the class-counsel issue presented by this Petition, the Second Circuit affirmed the district court's ruling in a brief footnote. *See id.* at 7a n.3. What the court found dispositive was that the district court's conclusion that "Foundation counsel are clearly in conflict with the objectives of plaintiffs and the putative class and cannot act in their best interests" was "well grounded in the record." *Id.* That being the case, the court of appeals held that "the district court did not abuse its discretion in declining to appoint the Foundation as class counsel." *Id.* Chief Judge Jacobs, who wrote separately to take issue with the majority's reasoning on one of the merits issues, specifically stated his agreement "entirely" with the panel's holding "that plaintiffs' counsel should not be appointed as class counsel." *Id.* at 23a (Jacobs, C.J., concurring).

ARGUMENT

I. THIS CASE PRESENTS NO UNRESOLVED LEGAL ISSUE BUT ONLY THE FACT-BOUND QUESTION OF WHETHER THE DISTRICT COURT'S DISCRETIONARY REFUSAL TO APPOINT PETITIONERS' LAWYERS AS CLASS COUNSEL WAS "WELL GROUNDED IN THE RECORD"

A. Rule 23(g) of the Federal Rules of Civil Procedure provides that if a court certifies a class under Rule 23, it "must appoint class counsel." Fed. R. Civ. P. 23(g)(1). When there is only one applicant for appointment as class counsel, Rule 23(g)(2) establishes the following standard for determining whether that applicant may be appointed: "the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4)." Rule 23(g)(4), in turn, describes the "duty of class counsel" as follows: "Class counsel must fairly and adequately represent the interests of the class." As the district court recognized,

this duty imposes on class counsel "an obligation that may be different from the customary obligations of counsel to individual clients." Pet. App. at 40a (citing Fed. R. Civ. P. 23(g)(1) advisory committee's note, 2003 amendments).

The determination under Rule 23(g) whether an applicant for appointment as class counsel will "fairly and adequately represent the interests of the class" is a matter within the district court's discretion. *See, e.g., International Union, United Auto. Workers v. General Motors Corp.*, 497 F.3d 615, 625-26 (6th Cir. 2007). And the question of "[w]hat constitutes adequate representation is a question of fact that depends on the circumstances of each case." 7A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1765, at 322 (3d ed. 2005). In this case the trial judge determined, based on an abundant factual record, that petitioners' counsel could not serve as counsel for a class consisting of public-sector employees because in litigating the case counsel were pursuing the objectives of the organization that employed them and that was funding the litigation, which objectives were in conflict with the interests of the class they sought to represent. Specifically, the court found – based in large part on internal documents of the National Right to Work Foundation produced in discovery – that the Foundation's objective in funding such class-action litigation against public-sector unions was "to defend the interests of the taxpayers who are forced to pay those public employees' salaries and benefits by weakening the ability of unions to achieve gains for public sector employees that entail costs to taxpayers, and making it harder for unions to resist privatization of public-sector jobs including those of the class members the Foundation seeks to represent here." Pet. App. at 39a. The court quoted the Foundation's own literature in describing its efforts in such litigation as "sending 'Foundation attorneys' into

battle ... to 'strik[e] a blow for taxpayers everywhere.'" *Id.* at 41a. That objective, the court appropriately concluded, was contrary to the economic interests of the public employees whom those attorneys sought to represent. And the court pointed to the discovery documents as well as counsel's conduct of the litigation itself in rejecting counsel's attempts to separate themselves from their employer. *Id.* at 40a-43a.

The district court's holding thus rests entirely on the uncontroversial principle that counsel cannot represent a class if they are pursuing objectives that are contrary to the interests of that class. If indeed, as the district court held, petitioners' counsel were guided, in conducting this litigation, by their employer's professed interest in furthering the interests of *taxpayers* – to the detriment of the jobs, wages, and benefits of the public employees who made up the class counsel sought to represent – then it is clear not only that the district court was acting well within its discretion in declining to appoint them as class counsel, but indeed that any other decision would have been an abuse of discretion.

That being the case, the only remaining issue presented by the Petition is the factual question of whether – as the Second Circuit held – the trial court's decision was indeed "well grounded in the record." Pet. App. at 7a n.3. That question is readily answerable in the affirmative, on the basis of considerable record evidence that was discussed by the district court, as well as much additional evidence that was not. In any event, however, the question whether the facts that were before the district court supported the decision it made is not an issue of the kind that this Court sits to review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In short, this case presents no significant legal issue

requiring this Court's consideration. The legal principle upon which the district court and the Second Circuit based their determinations is beyond controversy, and the fact-bound question of whether they were right about what the record showed is not one for this Court to review.

B. Petitioners attempt to conjure up a significant legal issue by characterizing the district court's holding as based on the Foundation's "views on public issues," Pet. at 24, and thus as a holding that would largely preclude public interest organizations from supporting class-action lawsuits. *E.g.*, *id.* at 4, 19, 23-25. But that simply misstates the basis for the court's holding. The court found that Foundation counsel could not represent a class of public-sector employees not because of the Foundation's ideology or views, or whether class members "might not agree with every ideological position taken by the Foundation over the years." *Id.* at 23. Nor was the problem "[t]hat the Foundation opposed higher taxes." *Id.* at 24. Rather, the district court's concern was that the Foundation was funding this litigation, and its employee/attorneys were conducting the litigation, with the aim of attaining objectives that were diametrically opposed to the economic interests of the members of the class they sought to represent.[3]

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[3] The district court's conclusion that in this case the Foundation and its counsel were using plaintiffs and the public-employee class as "pawns in litigation that is being conducted in the interest of taxpayers," Pet. App. at 39a, was well illustrated by evidence that even some of the named plaintiffs were unaware of and surprised to learn of the Foundation's litigation objective of holding down public-sector wages in the interests of the taxpaying public. For example, one of the plaintiffs testified in his deposition as follows:

Q [D]o you think your salary as a probation officer is too low, too high or about right?

A Too low.

Q Too low?

Nothing in the district court's holding would prevent any public-interest organization from funding class-action litigation, as long as the organization's objectives in doing so were not in conflict with the interests of the class. But it most assuredly is the case that any other public-interest organization would face exactly the same problem that the Foundation faced here if its objective in assigning its attorney/employees to bring a class action under Rule 23 was demonstrably at odds with the interests of the members of the putative class, and the attorneys' actions in litigating the case demonstrated their adherence to that objective rather than to the interests of the class.

II. CONTRARY TO PETITIONERS' CHARACTERIZATION, NO CONSTITUTIONAL ISSUE OR SPLIT IN APPELLATE AUTHORITY IS PRESENTED

Notwithstanding petitioners' attempt to portray it as

A Uhm-uhm, too low.
Q You think you ought to be paid more for what you do?
A Yes.
Q Even if it costs the taxpayers of Monroe County a little bit more?
A Sure.
Q Do you know whether the Right to Work Foundation brings lawsuits like this against public employee unions in order to strike a blow for taxpayers everywhere?
A I wasn't aware.
Q You've never heard that?
A No.
Q Is that your goal in this lawsuit, to strike a blow for taxpayers?
A No.

CA2 App. at 141-42. The district court also cited evidence that plaintiffs had been unaware that their attorneys intended to seek not only punitive damages but the "punitive" remedy of restitution of the full agency fee, including the amounts that were indisputably chargeable to objecting feepayers. Pet. App. at 38a & n.3.

such, this case raises no issue of a split in appellate authority, and certainly none involving a constitutional issue.

A. Petitioners first endeavor to portray the Second Circuit's affirmance of the district court as part of a circuit split based on *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. 1989).

In *Gilpin* the Seventh Circuit recognized that litigation of this kind could be used as a vehicle to impair the ability of a union to protect the wages, benefits, and working conditions of the employees it represents, union members and nonmembers alike, and that litigation pursued with that objective was consistent only with the aims of those nonunion employees who were hostile to unions on political and ideological grounds – but not with the interests of "free riders," who were happy to reap the benefits of union representation but declined to become union members because they did not want to pay any more for that representation than they were forced to. *Id.* at 1313. In *Gilpin*, the plaintiffs and their counsel had sought the same remedy of "restitution" – *i.e.*, repayment to all agency feepayers of the entire agency fee, including the portions indisputably germane to collective bargaining – that petitioners and their counsel sought here. Writing for the court, Judge Posner explained that such a "punitive" litigation objective was consistent only with the interests of those members of the putative class who wanted to "weaken and if possible destroy the union," but not with the interests of the "free rider" class members who "have no desire to ruin the union or impair its ability to represent them effectively." *Id.* That "potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately." *Id.*

Contrary to petitioners' formulation, the Seventh

Circuit's holding that a class could not be certified rested *not* on "the ideology of the sponsoring public-interest legal organization," Pet. at 19, but rather on the litigation objectives pursued, on behalf of the plaintiffs and the putative class, by the attorneys employed by that organization. *See* 875 F.2d at 1313 ("The 'restitution' remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with – and only with – the aims of the first type of employee."). Judge Posner's analysis in *Gilpin* is, in point of fact, a straightforward application of this Court's teaching in *Hansberry v. Lee*, 311 U.S. 32 (1940), which held that a class action could not be brought to enforce a racially restrictive covenant on behalf of a class of landowners, of whom some wanted the covenant enforced and others did not.

Notwithstanding petitioners' attempt to create the appearance of a circuit split, there is in fact no disagreement among the circuits about the holding of *Gilpin*. As petitioners point out, Pet. at 18-19, *Gilpin* has been relied on by several other circuits presented with similar factual situations. *See Weaver v. University of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992); *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 305-06 (4th Cir. 1991); *see also Pilots Against Illegal Dues v. ALPA*, 938 F.2d 1123, 1134 (10th Cir. 1991) (citing *Gilpin* with approval). Petitioners are wrong, however, in implying that the District of Columbia and Ninth Circuits have disagreed with *Gilpin*. Pet. at 19 & n.32.

Petitioners' citation of *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995), is not at all on point. While in that case the D.C. Circuit reversed a district court decision declining to certify a class, the issue had nothing to do with *Gilpin*, to which the court made no reference. *See id.* at 1378. And the Ninth Circuit case

petitioners cite, *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003), merely found *Gilpin* inapplicable on the facts of the case; the court determined that the fact that the plaintiffs sought the punitive remedy of restitution was irrelevant because that remedy was not available under Ninth Circuit caselaw. *Id.* at 895-96. But the court made clear its agreement with *Gilpin*'s basic holding, by approving the district court's willingness to reconsider class certification should the plaintiffs attempt to change existing law through the en banc process or by petition to this Court. *Id.* at 896.[4]

To the extent there exists any disagreement between *Cummings* and the other courts cited, it is at most about whether – as suggested by dicta in the closing paragraph of the Ninth Circuit's analysis, 316 F.3d at 896 (quoted in part in Pet. at 20), and by an unpublished decision of the same court, *Wagner v. Prof'l Eng'rs*, 3 Fed. App'x 594, 595 (9th Cir. 2001) (quoted in Pet. at 21) – the existence in a particular bargaining unit of the "free rider" type of nonunion member described by Judge Posner can properly be assumed, or whether it must be proved up through evidentiary submissions.

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[4] Similarly, most of the district court cases cited by petitioners, Pet. at 19 n.32, do not call into question the holding of *Gilpin* but rather distinguish that case on the basis of the particular facts presented – for example, that the plaintiffs had not sought "restitution" or any other punitive remedy, *Leer v. Washington Educ. Ass'n*, 172 F.R.D. 439, 446-47 (W.D. Wash. 1997); *Lutz v. International Ass'n of Machinists*, 196 F.R.D. 447, 453 (E.D. Va. 2000); *Baird v. California Faculty Ass'n*, No. CIV S-00-0999, 2000 WL 1028782, at *5 (E.D. Cal. July 13, 2000), that the punitive remedy sought was legally unavailable, *Friedman v. California State Employees Ass'n*, No. CIV S000101, 2000 WL 288468, at *6 (E.D. Cal. Mar. 15, 2000) – or because the court required empirical evidence of diverging interests within the class, *Swanson v. University of Hawaii Prof'l Assembly*, 212 F.R.D. 574, 577 (D. Haw. 2003).

That evidentiary question, however, is not presented here. The district court rejected the Foundation attorneys as class counsel not because of any generalized view about the interests of "free rider" nonmembers, but because the court found that the Foundation's litigation objective of holding down public-employee salaries and benefits in the interest of the taxpaying public was directly at odds with the economic interests of the public employees who made up the class. Far from "sheer speculation," as petitioners would have it, Pet. at 20, that determination rested on the self-evident proposition that most public employees would not see it in their interest to be paid less. Such a conclusion based on experience and common sense is one that a judge surely can reach without requiring evidentiary submissions.[5]

In short, the Second Circuit's decision in this case is in no way "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), so as to require this Court's attention.

B. Nor does the district court's refusal to appoint petitioners' attorneys as class counsel raise a First Amendment issue of any kind, let alone one involving a conflict in authority.

It bears emphasis, in the first place, that the issue is not petitioners' right as individual litigants to choose their own counsel for litigation of individual claims. Rather,

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[5] And, in any event, it is a conclusion that indeed has evidentiary support in the district court record. Even one of the named plaintiffs testified on deposition that he thought he should be paid more "[e]ven if it costs the taxpayers of Monroe County a little bit more." *See supra* note 3. And several plaintiffs testified that part of what led them to leave the union was their dissatisfaction with its acceptance of a longer work week and its insufficiently vigorous advocacy on issues of overtime and salaries, *see* CA2 App. at 103, 125 – benefits that would have involved additional costs to taxpayers.

the question is whether petitioners' Foundation-employed counsel can represent, in a class action, people who have not sought their representation, *i.e.*, absent class members. Whatever misunderstanding there may have been on this point in the district court's initial order was cleared up in the court's subsequent order of December 21, 2006, which expressly affirmed that, although plaintiffs' attorneys "were not qualified to serve as class counsel," "[n]othing in this Court's decision precludes the Foundation attorneys from representing the plaintiffs in their individual capacities." Pet. App. at 55a; *see also id.* at 56a-57a. And indeed petitioners' Foundation-employed counsel continued to represent the petitioners in litigating their claims as individuals.

The issue, accordingly, is not petitioners' right to "cho[o]se to associate themselves with lawyers whose work is funded by the Foundation," Pet. at 29-30, but rather whether representation by those lawyers of a class certified under Rule 23 will "afford that protection to absent parties which due process requires." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). In this regard, the "courts have recognized that the attorneys for the class perform a major role in assuring that the representation satisfies due-process standards." 7A *Federal Practice and Procedure* § 1769.1, at 442.

These due process considerations, embodied in the requirement of Rule 23(a)(4) that the class representatives "will fairly and adequately protect the interests of the class," and in the similar duty imposed on class counsel by Rule 23(g)(4), preclude the "selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent." *Hansberry*, 311 U.S. at 45. Petitioners' suggestion that this application of Rule 23 constitutes impermissible "viewpoint dis-

crimination," Pet. at 16, borders on the frivolous. The district court's determination under Rule 23(g) that class counsel could not be appointed if their litigation objectives were at odds with the interests of the class they purported to represent is well-grounded in the compelling state interest in ensuring the protections of due process to persons who are to be bound by the judgment in a lawsuit in which they have not personally participated.[6]

III. IN LIGHT OF THE SECOND CIRCUIT'S MERITS HOLDINGS, CLASS CERTIFICATION IS NOW IRRELEVANT IN THIS LITIGATION

This Court's determination whether to grant the Petition turns principally, of course, on the importance of the legal issue presented – and as we have already shown, the Petition presents no question of law that merits this Court's consideration. It also bears mention, however, that in light of the Second Circuit's disposition of the merits issues the class counsel question raised by the Petition is of little or no consequence even for this litigation itself.

Of the two merits issues petitioners raised on appeal, the Second Circuit affirmed the district court's judgment in favor of defendants with respect to CSEA's use of the local union presumption. Pet. App. at 17a-22a. On the other issue – the chargeability of organizing expenditures – the Second Circuit agreed with the district court that the expenditures at issue were germane to collective bar-

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[6] It should go without saying that, contrary to petitioners' characterization, the district court did not decline to appoint petitioners' counsel because "the court disagree[d] with the [ideological views of] the supporting organization." Pet. at 17. Judge Telesca's opinion offers no clue as to whether he agrees or disagrees with the Foundation's efforts to hold down public employee salaries and benefits; rather, the court's decision was based on the obvious proposition that public employees – whether union members or not – would be unlikely to find such efforts in their interests.

gaining, but reversed on the ground that "*these particular plaintiffs* ... as probation officers ... derive little meaningful benefit" from CSEA's efforts to organize private-sector workplaces in the developmental disability, food service, and courier industries. Pet. App. at 14a (emphasis in original).

Neither party has sought review by this Court of the Second Circuit's merits determinations. Accordingly, any question of class certification with respect to the local presumption issue – as to which petitioners and the class they wish to represent no longer have any claim – is now moot. While at least technically that may not be so with respect to the organizing issue, the Second Circuit's resolution of this issue makes clear that – even apart from the question of the adequacy of plaintiff's counsel to serve as class counsel – the class certification sought by plaintiffs could not be granted. Because the statewide class of all CSEA-represented agency fee payers plaintiffs sought to certify, *see* Pet. at 9, would include many employees who, because of the nature of their employment, could under the Second Circuit's ruling lawfully be charged for the union's organizing expenditures in the developmental disability, food service, and courier industries, the putative class would fail the "commonality" requirement of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *see Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (issues must "turn on questions of law applicable in the same manner to each member of the class").[7]

Thus, as it is "evident that the resolution of the [question presented by the Petition] could not change the result reached below," it would be appropriate to deny

[7] The same analysis would apply with respect to the subclass of agency fee objectors sought by plaintiffs. *See* Pet. at 9. That subclass similarly would include CSEA-represented workers employed in a variety of jobs.

the Petition even if it otherwise had merit. Eugene Gressman *et al.*, *Supreme Court Practice* 248 (9th ed. 2007).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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